State of Utah

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Lieutenant Governor

Department of Transportation

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Executive Director

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Deputy Director

December 9, 2004

Mr. Wade Budge
Snell & Wilmer LLP
15 West South Temple Street, Suite 1200
Salt Lake City, UT 84101

Subject: Findings and Order – Steven Schroeder, #2004-02-27

Dear Mr. Budge:

Enclosed are the Amended Findings and Order with respect to the hearing held November 17, 2004. We appreciate your time and effort in working with us in this matter. I remind you should you desire to pursue your appeal further that you have 30 days from the date of this letter to file a court action.

Sincerely,

David K. Miles, P. E.
Hearing Officer

DKM:js

cc: Mark Burns
Dave Miles
Jim Beadles
Shawn Debenham
File

FINDINGS AND ORDER

Application of Steven Schroeder (I-15, Milepost 304.11, west side – Region Two)
File No. 02-27

FINDINGS

Steven Schroeder, a landowner along I-15 at milepost 304.11, applied for a billboard permit on August 3, 2004. Region Two denied the permit on the grounds that it was within 500 feet of the 4500 South interchange. According to a lease agreement that Mr. Schroeder submitted, National Advertising Company leased land for the billboard from Mr. Schroeder's predecessor in 1984. Mr. Schroeder purchased the property in 1995. One of the inducements of purchasing the land, according to him, was that he would receive rentals from the billboard company.

Though no one could recall when it occurred, Viacom purchased the use of the billboard from National Advertising Company and applied for a billboard permit with UDOT in its own name. For at least a period of time after Mr. Schroeder's purchase, Viacom used the billboard and continued to make monthly lease payments. Again according to Mr. Schroeder, Viacom stopped paying him in either 2001 or 2002 and also stopped maintaining the structure or putting advertising on it.

Viacom's UDOT permit expired automatically in February 2004. In July 2004, Mr. Schroeder sent a letter to Viacom that told the company to vacate his property and remove the billboard. He also stated that if Viacom did not make arrangements to remove the structure within 10 days, he would consider it abandoned and would remove it himself.

But Mr. Schroeder did not remove the billboard. Instead, on August 3, he applied to Region Two for his own advertising permit. This application Region Two denied on August 12, citing the proximity of the 4500 South interchange as the reason.

Mr. Schroeder challenges Region Two's denial on two grounds. First, according to him, the permit had automatically transferred by operation of law. Consequently, even if the billboard were within 500 feet of the interchange, he would be entitled to maintain the permit, just as Viacom would have been able to renew its permit. Second, says Mr. Schroeder, even if the billboard permit did not automatically transfer to him, Region Two should have measured the 500 feet from the "gore," rather than the point of pavement widening. Had Region Two measured in that way, claims Schroeder, the billboard site would have been more than 500 feet from the interchange and, thus, permittable

Schroeder is simply wrong when he states that Viacom's permit should have transferred automatically. Not only does he fail to identify a particular time or reason for this automatic turnover, but nothing in the law supports his entitlement to it. Utah Code Ann. § 72-7-506(7) states that permits are "transferable if the ownership of the permitted sign is transferred." But, "transferable" means "capable of being transferred," not automatically transferred. *Webster's Third New International Dictionary* (Merriam-Webster Inc. 1986) at 2427. The ending "able" indicates not only that it is capable of being transferred, but also that someone must take an affirmative action to make the transfer happen.[1] Schroeder introduced no evidence showing that he ever tried to get Viacom's permit transferred. Indeed, until this hearing, he never told UDOT that he believed the billboard was actually his.[2]

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[1] Similarly, something that is "voidable" is not actually void until so declared by a court. Bryan A. Garner, *Black's Law Dictionary* (West Group 1999) at 1568.

[2] Since neither party has raised the issue, UDOT will accept for now Schroeder's claim to own the billboard, even though paragraph 11 of the National Advertising Company lease agreement says that the lessee maintains ownership of the structure. At the hearing, Schroeder asserted, without support, that the billboard automatically became his after termination of the lease. UDOT assumes that Schroeder's claim of an automatic transfer of ownership of the billboard is more solidly based in the law than the claim of an automatic transfer of the permit. We note that his August 3 application says that Schroeder certifies his ownership of the billboard, an essential factual predicate to even getting his own permit.

The claim that Region Two should measure from the gore is more problematic, however, and requires further analysis. Two provisions of the outdoor advertising code are central to this examination: Utah Code Ann. § 72-7-502(19) and Utah Code Ann. § 72-7-505(3)(c)(i)(A). The latter is the substantive provision that bars billboards within 500 feet of an interchange and it reads:

> [S]igns may not be located on an interstate highway or limited access highway on the primary system within 500 feet of an interchange, or intersection at grade, or rest area measured along the interstate highway or freeway from the sign to the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way.

Subsection 72-7-502(19) is the definition of "point of widening."

> [T]he point of the gore or the point where the intersecting lane begins to parallel the other lanes of traffic, but the point of widening may never be greater than 2,640 feet from the center line of the intersecting highway of the interchange or intersection at grade.

Schroeder argues that the two provisions should be melded together in such a way that the Subsection 72-7-5-5(3)(c)(i)(A) would essentially read as follows: Signs may not be located on an interstate highway or limited access highway on the primary system within 500 feet of an interchange, or intersection at grade, or rest area measured along the interstate highway or freeway from the sign to the nearest gore or the point where the intersecting lane begins to parallel the other lanes of traffic, but the point of widening may never be greater than 2640 feet from the center line of the intersecting highway of the interchange or intersection at grade at the exit from or entrance to the main-traveled way.[3] Schroeder does not give any significance to the term "pavement widening."

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[3] The underlined text shows the insertion of both parts of the definition of "point of widening."

According to Schroeder then, the code allows for the 500 feet to be measured from either of two places, i.e., (1) the gore; or (2) the point where the intersecting lane begins to parallel. Further, claims Schroeder, Region Two must use the measuring point that will allow advertising to occur in order to fulfill the legislature's intent to foster advertising.[4] That would be the gore, says Schroeder.[5]

Accepting Mr. Schroeder's invitation to use the "gore" as the end of the measuring stick, however, would violate the foundational document of the outdoor advertising code, i.e., the Utah-Federal Agreement for the Control of Outdoor Advertising.[6] Signed by the governor and the Secretary of the United States Department of Transportation in 1968 and later ratified by the legislature, this document sets out the parameters by which the state can allow billboards along interstates. The 1999 Utah Legislature declared the primacy of this document when it enacted a statute that states "[t]he provisions of this part [the outdoor advertising code] are subject to and shall be superseded by conflicting provisions of the Utah-Federal Agreement." Utah Code Ann. § 72-7-515(2).

Regarding the measurement of the all-important 500 feet, the Agreement says the following:

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[4] In truth, it is almost impossible to ferret out the legislature's intent from the simple, albeit confused language of the outdoor advertising law. According to Utah Code Ann. § 72-7-501(1), the purpose of the outdoor advertising act is manifold – public safety, health, welfare, convenience and enjoyment of travel, protecting the public investment in highways, and to preserve natural scenic beauty. In fact, Schroeder's proffered purpose, i.e., fostering outdoor advertising, is actually the last in this lengthy list. In any event, legislative intent is relevant only when a statute is ambiguous. *Lovendahl v Jordan Sch. Dist.*, 2002 UT 130, ¶ 21, 63 p.2D 705. For reasons discussed later in this Order, the ambiguity of these statutory provisions poses no difficulty in deciding this case.

[5] "Gore" is not defined in the outdoor advertising code. In fact, the only definition of that term is in the Traffic Code, where driving in the gore is outlawed. Utah Code Ann. § 41-6-63.30.

[6] The Agreement has been placed into the Utah Administrative Code as a rule. It can be found on the Internet at http://www.rules.utah.gov/publicat/code/r933/r933-005.htm.

> No sign may be located on an interstate highway or freeway within 500 feet of an interchange, or intersection at grade, or rest area (measured along the interstate highway or freeway from the sign to the nearest point of the beginning or ending of pavement widening at the exit from or entrance to the main-traveled way).

UDOT is obligated to enforce the language of the legislature, where here, ironically, requires UDOT to apply the Agreement rather than Section 72-7-502(19). Consequently, the "gore" cannot be an end of the measuring stick.[7] Rather, the measurement begins with the sign and ends at the place where the pavement widens. From the perspective of public safety, which is first in the legislature's list of "purposes" for the statutory regulation of billboards,[8] measuring from the point of pavement widening results in safety enhancement because it restricts outdoor advertising in areas where distractions for motorists can lead to accidents. These are areas where considerable lane changing and merging require drivers to focus attention solely on driving. Schroeder nowhere challenges Region Two's identification of the place of "pavement widening." UDOT also accepts the region's calculation.

ORDER

UDOT affirms Region Two's denial of Schroeder's permit application.

DATED THIS 9th day of December 2004.

David K. Miles
Administrative Hearing Officer
State Operations Engineer

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[7] UDOT does not take this step lightly. UDOT is obligated to follow legislative command, but here, those legislative commands conflict. We cannot both use the gore as a measure and follow the Agreement, since the Agreement does not recognize the gore as a measuring point. UDOT must then follow the latest pronouncement of legislative intent, i.e., the provisions of Section 72-7-515, which was enacted in 1999.

[8] Conversely, fostering outdoor advertising is last on that list. Utah Code Ann. § 72-7-501(1).

Notice Of Right To Judicial Review Or Petition For Reconsideration

You may appeal this order to Third District Court by filing a complaint within 30 days of the issuance of this decision pursuant to Utah Code Ann. § 63-46b-15. Alternatively, you may petition UDOT for reconsideration by filing a petition within 20 days of the issuance of this decision. Please follow the procedures set forth in Utah Admin. Code R907-1-5 in filing this petition. Should you choose to file a petition for reconsideration, you may appeal for judicial review after UDOT has acted on your petition.